
In the United States Court of Appeals
for the Ninth Circuit

No. 19,521

*See checked
Vol. 3375*

FLOTILL PRODUCTS, INC., a corporation, MRS. MEYER
L. LEWIS, ALBERT S. HEISER, and ARTHUR H. HEIS-
ER, individually and as officers of said corporation,
PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION OF RESPONDENT FOR REHEARING

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To: Hon. Stanley N. Barnes, Circuit Judge
Hon. Frederick G. Hamley, Circuit Judge
Hon. William C. Mathes, Senior District Judge

Comes now respondent, the Federal Trade Commis-
sion, and, pursuant to the Court's Rule 23, petitions
for rehearing of so much of the decision of this Court,
issued March 16, 1966, as holds that the Commission
lacks authority to issue a valid cease and desist order
without the concurrence of a majority of its members.
It is respectfully suggested that a rehearing *en banc*
of this question is appropriate for the reasons set
forth below.

1. Subsequent to this Court's decision, the Supreme Court, in *Federal Trade Commission v. Borden Company*, — U.S. —, No. 106, decided March 23, 1966, affirmed certain Commission action taken by a vote of two of the three Commissioners who participated in the decision under review. While the particular question was not argued in that case, the fact that only two Commissioners had voted for the action under review was called to the attention of the Supreme Court and the Court of Appeals in the briefs therein, and had been specifically noted in the decision of the Court of Appeals for the Fifth Circuit, *Borden Company v. Federal Trade Commission*, 339 F.2d 133 (1964).

2. The instant decision, by a divided panel of this Court, is in conflict with the decisions of the other Courts of Appeals which have ruled on the question. In the most recent of these decisions, *Atlantic Refining Co. v. Federal Trade Commission*, 344 F.2d 599 (6th Cir. 1965), *cert. denied*, 382 U.S. 939, the Supreme Court refused to grant a petition for certiorari which urged as grounds therefor a ruling contrary to that of this Court.¹

3. The decision will not only lay open to question the validity of a number of pending cases of the Fed-

¹ On April 1, 1966, the petitioner in *Purolator Products, Inc. v. Federal Trade Commission*, 352 F.2d 874 (7th Cir. 1965), Sup. Ct. No. 928, filed in the Supreme Court a motion to amend a petition for certiorari seeking reversal of a judicial affirmance of a Commission order issued by a 2 to 1 vote. The motion cited this Court's opinion in the instant case as the sole authority for its position that Commission action taken by such a vote is invalid.

eral Trade Commission,² but may subject to attack actions of other administrative agencies, which, like the Federal Trade Commission, have no specific statute governing the minimum number of members required to take agency action and so have adhered to the common law rule that a majority of a quorum is sufficient. These agencies include the Atomic Energy Commission (42 U.S.C. 2031, *et seq.*), the Federal Power Commission (16 U.S.C. 792, *et seq.*), the Civil Aeronautics Board (49 U.S.C. 1321, *et seq.*), the Securities and Exchange Commission (15 U.S.C. 78d, *et seq.*), and the United States Tariff Commission (19 U.S.C. 1330, *et seq.*). A number of these agencies have expressed concern to respondent about the possible impact of this decision upon their activities.

4. The rule set forth by this Court would prevent the Commission and other administrative agencies from taking action in the not infrequent instances when vacancies or disqualifications result in three of five Commissioners hearing a case, and the three are

² The importance of this question to the Commission is shown by the fact that it has been raised, in addition to the aforementioned *Purolator* case, in *Forster Mfg. Co., Inc. v. Federal Trade Commission* (1st Cir. No. 6625), argued April 5, 1966, awaiting decision, in *Luria Bros. & Co. v. Federal Trade Commission* (3d Cir. No. 14,402 and 14 separate related petitions), argued January 21, 1966, awaiting decision, and in *Lapeyre v. Federal Trade Commission* (5th Cir. No. 21,787), oral argument scheduled for April 19, 1966. And the question recently has been raised in this Court in a pending case, *Continental Baking Co. v. Federal Trade Commission* (9th Cir. No. 19,325), argued February 11, 1966, wherein the Commission affirmed by a 2 to 1 vote rulings decided by a 3 to 1 vote prior to a remand to the examiner.

unable to render a unanimous decision. In such cases, a single Commissioner may veto the desires of the majority of a quorum.

5. The decision may well cause confusion as to when an administrative agency should hear cases since, under it, three members of a five-member agency may hear cases and render decisions if the three participating members are in agreement, but cannot act if they are divided in opinion. An agency will not know whether it can take effective action until it is known how the individual members of the quorum will cast their votes. Agencies undoubtedly will be reluctant to have three members hear cases which may have to be reheard by a larger number of Commissioners if and when such a larger number can be gathered.

6. The majority opinion indicates that "the reasonable construction" of the Commission's rule that a majority of its members constitutes a quorum (16 C.F.R. § 1.7) would be that a majority of a quorum is sufficient to render a decision (slip op., p. 6), but then holds that this regulation is not within the power of the Commission to adopt, because it extends beyond the power conferred by Congress upon the Commission. It is submitted that this holding fails to note the power granted the Commission by Congress in Section 6(g) of the Federal Trade Commission Act (38 Stat. 722; 15 U.S.C. § 46(g)), which authorizes the Commission "to make rules and regulations for the purposes of carrying out the provisions of this Act."

Therefore, respondent suggests that the question is appropriate for a rehearing *en banc* by this Court.

Respectfully submitted.

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Washington, D.C.

CERTIFICATE OF COUNSEL

I hereby certify that in connection with the preparation of this petition for rehearing, I have examined Rule 23 of the United States Court of Appeals for the Ninth Circuit, that this petition is not interposed for delay, and that, in my judgment, this petition is well founded.


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